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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

ESTATE OF FRANK A. VANDERLIP, deceased, NARCISSA COX VANDERLIP, VIRGINIA VANDERLIP SCHOALES, FRANK A. VANDERLIP, JR., KELVIN COX VANDERLIP and CITY BANK FARMERS TRUST COMPANY, as Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this cause on April 23, 1946.

STATEMENT.

This suit was instituted by petition to the Board of Tax Appeals (now The Tax Court of the United States) for review of a determination of the Commissioner of Internal Revenue assessing an estate tax

deficiency. The Tax Court upheld the determination that certain proceeds of life insurance policies were includible in the gross estate of the decedent as transfers made in contemplation of death (3 T. C. 358).

The Circuit Court of Appeals affirmed the decision of the Tax Court (155 F. (2d) 152).

Outline of the Subject Involved and Questions Presented.

On June 1, 1932, the decedent, Frank A. Vanderlip, transferred certain life insurance policies (which were issued prior to the effective date of the Revenue Act of 1918) to trustees under an irrevocable deed of trust, whereby he relinquished all incidents of ownership. Just before transferring the policies in the aggregate face amount of $923,868, the decedent had borrowed $398,898.51, their full cash surrender value. After the transfer, the trustees who had discretion as to the employment of dividends or other income from the trust assets, applied toward the payment of premiums and interest on policy loans all the dividends credited to said policies and all additional loan value thereafter accruing; any balance was paid by the decedent.

The decedent died on June 29, 1937, and the Commissioner of Internal Revenue by a final notice of deficiency dated September 26, 1941, determined that the net proceeds of such life insurance policies of $421,815.66 were includible in his gross estate.

The Commissioner and petitioners stipulated as follows:

"The decedent's transfer of said policies of

> insurance upon his life to said trustees pursuant to said trust agreement dated June 1, 1932, ('Exhibit 6') was motivated solely by the decedent's desire to avoid estate taxes thereon and was not otherwise made in contemplation of death within the meaning of the Revenue Acts of 1926 and 1932, as amended, or of the Regulations thereunder" (R., p. 30).

The Tax Court in its opinion sustained the determination solely upon the ground that the decedent's transfer of the policies of life insurance to his trustees was made in contemplation of death.

The principal questions presented are:

1. Were the life insurance policies herein transferred in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended?

2. Should any portion of the proceeds of said policies of insurance, which were issued prior to the effective date of the Revenue Act of 1918, be included in the decedent's gross estate?

3. Was the transfer of the life insurance policies herein a substitute for a testamentary disposition, and, therefore, in the absence of substantial motives associated with life, a transfer in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended?

4. Is this case governed by *Allen* v. *Trust Company of Georgia* decided by this Court on January 28, 1946?

5. Was that portion of the proceeds of the life insurance attributable to the premiums paid by the Trustees properly included in the taxable estate?

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that any portion of the proceeds of the policies of insurance on the life of the decedent received by the trustees should be included in the decedent's gross estate.

2. The Circuit Court of Appeals erred in holding that Section 302(c) of the Revenue Act of 1926, as amended, applied to said proceeds of life insurance.

3. The Circuit Court of Appeals erred in holding that the assignment of the policies of life insurance by the decedent to the trustees on June 1, 1932, was a transfer made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended.

4. The Circuit Court of Appeals erred in holding that the assignment of the policies of insurance to the trustees was a transfer made by the decedent in contemplation of death within the meaning of the Revenue Act of 1926, as amended, because such transfer was motivated solely by the decedent's desire to avoid estate taxes thereon, inasmuch as the transfer was not otherwise made in contemplation of death within the meaning of such statute.

5. The Circuit Court of Appeals erred in holding that the Federal estate tax imposed by the Revenue

Act of 1926, as amended, applied retroactively to the proceeds of policies of life insurance which had been issued prior to the effective date of the Revenue Act of 1918.

6. The Circuit Court of Appeals erred in holding that the transfer of the policies was a substitute for a testamentary disposition and, therefore, in contemplation of death within the meaning of Section 302(c) because of the absence of substantial motives associated with life.

7. The Circuit Court of Appeals erred in not excluding $172,399.02 of the insurance proceeds from the taxable estate, in any event, because the premiums on that sum were not paid by the decedent.

Reasons Relied Upon for the Granting of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the case involves an important question of the administration of tax law which should be settled by this Court. The question is whether life insurance policies, in view of the specific coverage of Section 302(g) of the Revenue Act of 1926, as amended, can be the subject of a transfer taxable under Section 302(c) of the Revenue Act of 1926, as amended, (now Section 811 (c) and (g) of the Internal Revenue Code) as having been made in contemplation of death.

2. Because the decision of the Circuit Court of

Appeals is in conflict with the recent decision of this Court in *Allen* v. *Trust Company of Georgia,* decided January 28, 1946 as to when a transfer is in contemplation of death.

3. Because the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Denniston* v. *Commissioner,* 106 F. (2d) 925 excluding from the estate a transfer and a relinquishment of a power of appointment where the dominant and controlling motive was to save estate tax.

4. Because the criteria of taxability relied on by the Court below would render the transfer of life insurance policies by a young man in the best of health and without any traditional contemplation of death taxable as a transfer in contemplation of death. Tested solely as a substitute for testamentary disposition, irrespective of actual contemplation of death other than the general knowledge that all of us must die, any transfer of life insurance policies, which in their very nature represent a benefit to be conferred upon the death of the insured, becomes automatically taxable as a transfer in contemplation of death.

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner

be granted such other and further relief as may be proper.

Respectfully submitted,

ESTATE OF FRANK A. VANDERLIP, deceased, NARCISSA COX VANDERLIP, VIRGINIA VANDERLIP SCHOALES, FRANK A. VANDERLIP, JR., KELVIN COX VANDERLIP and CITY BANK FARMERS TRUST COMPANY, as Executors,

By EDWIN W. COONEY,
JOHN B. MARSH,
Attorneys for Petitioners.

EDWIN W. COONEY,
ALEXANDER HAMMOND,
PAULINE TAYLOR,
Of Counsel.

July 22nd, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

ESTATE OF FRANK A. VANDERLIP, deceased, NARCISSA COX VANDERLIP, VIRGINIA VANDERLIP SCHOALES, FRANK A. VANDERLIP, JR., KELVIN COX VANDERLIP and CITY BANK FARMERS TRUST COMPANY, as Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion and the findings of fact by the Tax Court (R., p. 54) are reported at 3. T. C. 358.

The opinion of the Circuit Court of Appeals (R., p. 75) is reported in 155 F. (2d) 152.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 23, 1946. Jurisdiction to issue the writ rests on Section 240(a) of the Judicial Code (28 U. S. C. Sec. 347) as amended by the Act of February 13, 1925.

Statement.

The facts material to the consideration of the questions presented are stated in the foregoing petition.

Statutes Involved.

The pertinent provisions of Section 302 of the Revenue Act of 1926, as amended, are as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—* * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless

shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death. * * *

(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the

amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Argument.

POINT I.

Congress did not intend Section 302(c) to apply to insurance payable to a designated beneficiary.

When Congress in the 1918 Revenue Act first imposed an estate tax upon the proceeds of a life insurance contract payable to a designated beneficiary, the report of the Ways and Means Committee of the House of Representatives* showed a clear statement of the congressional understanding and intention. It reported that although insurance payable to the executor was understood and accepted to be a part of the gross estate under the 1916 Act, insurance payable to a designated beneficiary was only to be taxed under the new 302(g).

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* "The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202(a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over

[Footnote continued on following page.]

Furthermore, the requirement of Section 314 for contribution to the payment of tax by the designated beneficiary who receives the insurance is inconsistent with the conception that insurance so payable is taxable under Section 302(c) or (d) because all tax on items included in the gross estate pursuant to the last mentioned sections is payable by the executor out of the general estate without any right of contribution.

To subject the taking out or the transfer of life insurance policies to the normal criteria of transfers in contemplation of death would bring within the ambit of Section 302(c) practically all life insurance contracts. That Congress never intended such a result and that it would render meaningless the specific provisions of past and the present revenue laws dealing with life insurance are revealed by the steps in which the Court below arrived at the conclusion of taxability.

Simply stated, the Court below first found that the transfer of the life insurance policies was equivalent to or was a substitute for a testamentary disposition of ordinary property such as bonds or money, and

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[Footnote continued from preceding page.]

which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the Committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum." H. R. Rep. No. 767, 65th Cong., 2d Sess., p. 22.

secondly, that the inducing motives were associated with death and not life.

All death benefit contracts must by their very nature be viewed as a substitute for or akin to a testamentary disposition. The Court below found no trouble in reaching this conclusion in the instant case and went on to point out this was necessarily true because life insurance does not involve a gift of income producing property. If the Court below was correct, then all policies must be similarly viewed as meeting the first test.

In analyzing the motives of the transfer to the trustees, whereby the insured relinquished his incidents of ownership, the Court concluded that the motive to save estate taxes was a death motive and the Court was unable to find any life motives. We submit that, whether or not the motive to save estate tax is present in a given case, it is impossible to demonstrate in life insurance cases a preponderance of life motives in either the taking out of the policies, the designation of new beneficiaries or in the relinquishment of the incidents of ownership. That is so because death benefit contracts necessarily are contracts to pay a given amount of money at the death of the insured. All other rights and motives are incidental and subsidiary to the payment of the proceeds upon the death of a given individual. Therefore it is practically impossible to demonstrate substantial inducing motives associated with life which are predominant over death motives.

POINT II.

The decision of the Court below is in conflict with *Allen* v. *Trust Company of Georgia.*

In *Allen* v. *Trust Company of Georgia* decided by this Court on January 28, 1946, the decedent admittedly released certain powers in order to avoid the imposition of estate tax upon certain trusts previously created. Following the decision by this Court in *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S. 85, the decedent learned that his reservation of the power to amend the provisions of the trusts rendered them taxable in his gross estate. Thereafter he relinquished his reserved powers with the sole motive of avoiding estate tax. In holding that the relinquishment of the power to amend was not a transfer in contemplation of death, this Court emphasized that the decedent was merely seeking to accomplish his original purpose in the creation of the trusts. This Court refused to look at the release as an isolated transaction which should be subjected to the ordinary tests to determine whether it had been made in contemplation of death. Viewing the original creation of the trust and the subsequent relinquishment as one integrated transaction, this Court held that the motives associated with death were not such as to render the total transaction a transfer in contemplation of death.

In the instant case, the decedent had taken out a number of policies on his life prior to the effective date of the Revenue Act of 1918. After this Court de-

cided *Chase National Bank et al.* v. *United States,* 278 U. S. 327, the decedent, Frank A. Vanderlip, learned that his reserved incidents of ownership threatened his insurance contracts with substantial estate taxation. The proceeds of the life insurance policies which he had thought would inure to his beneficiaries free of tax would thus be substantially reduced, since he was a man with considerable wealth which would be subjected to high rates of tax. Solely to save taxes and with no other motive of any kind, ancillary or otherwise, the decedent transferred the policies to the trustees in order to divest himself irrevocably of all incidents of ownership, the retention of which would be the occasion of the tax.

Since the sole motive of the transfer to the trustees was that of avoiding estate taxes, it is inconsistent with the stipulation to assume that in 1932 there was any change or variation, however minor, in the designated beneficial interests of Vanderlip's wife or children. Any alterations of such rights, however minor, resulting from the transfer necessarily would demonstrate a motive in addition to the motive of saving estate taxes. The stipulation precludes any such additional motive. Therefore, we must view the original taking out of the policies prior to the effective date of the Revenue Act of 1918 and their transfer to trustees in 1932 as though the insured had taken out policies of insurance being motivated by all the usual motives inherent in the procurement of large amounts of life insurance, together with an additional motive of thereby avoiding estate taxes. The situation must be regarded as though the result had been accomplished in one step—the insured taking out life insurance for the designated benefit of his widow and children and deciding not to

retain incidents of ownership in order to minimize taxes.

No tax was imposed in the *Trust Company of Georgia* case in which the two acts of the decedent, the one main and the other auxiliary, were such that if they had been simultaneously executed they would not have effected a transfer in contemplation of death. Similarly, in the instant case, if the original purchase of the contracts and the disposal of the reserved incidents of ownership are viewed as a whole, the integrated transaction cannot be a transfer in contemplation of death unless every purchase of insurance is so regarded.

If the taking out or the transfer of a policy of life insurance should be taxable as a gift in contemplation of death, it should only be upon proof of some apprehension, expectation or consideration of death other than the general expectancy of death possessed by all men. In such event there would have to be the familiar type of evidence concerning the insured's state of health, historically connected with contemplation of death cases.

In the instant case, the stipulation and the finding below that the "transfer", except for the motive of avoiding tax "was not otherwise made in contemplation of death", requires that the case be considered and decided in all respects as if the decedent on June 1, 1932 had been a young man in the best of health.

Petitioners' purpose is to show that the method of arriving at the result in this particular case is dependent upon an erroneous view which, if applied generally, would embrace all life insurance transactions within its scope. It would render meaningless the specific provisions of the law dealing with life insurance

contracts and it would have made unnecessary the decisions of this Court and all other Courts which laid down specific rules for the taxation of life insurance policies payable to designated beneficiaries.

Respectfully submitted,

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ALEXANDER HAMMOND,
PAULINE TAYLOR,
Of Counsel.

July 22nd, 1946.

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CITATIONS

710977—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 324

ESTATE OF FRANK A. VANDERLIP, DECEASED, NARCISSA COX VANDERLIP, VIRGINIA VANDERLIP SCHOALES, FRANK A. VANDERLIP, JR., KELVIN COX VANDERLIP, CITY BANK FARMERS TRUST COMPANY, AS EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 54–62) are reported in 3 T. C. 358. The opinion of the Circuit Court of Appeals (R. 75–79) is reported in 155 F. 2d 152.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 23, 1946. (R. 80–81.) The

petition for a writ of certiorari was filed on July 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the transfer of insurance policies to trustees, which was motivated solely by the decedent's desire to avoid estate taxes thereon, was a gift made in contemplation of the decedent's death within the meaning of section 302 (c) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *[1]

[1] This section was amended, but in particulars not material here, by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

Treasury Regulations 80 (1937 ed.):

> ART. 16. [As amended by T. D. 4966, 1940–1 Cum. Bull. 220] *Transfers in contemplation of death.*—
>
> * * * * *
>
> The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

STATEMENT

The facts were stipulated (R. 28–30) and were found by the Tax Court as stipulated (R. 55–58). They may be summarized as follows:

The decedent, Frank A. Vanderlip, died June 29, 1937, at the age of 73, survived by his wife, six children and several grandchildren. The

estate tax return showed a gross estate of approximately one million dollars. There had been no material change in the amount of the estate from June 1, 1932, to the date of his death. (R. 55.)

On June 1, 1932, at the age of 68, the decedent made an irrevocable transfer in trust of certain policies of insurance on his life aggregating $923,868.60, for the benefit of his wife and descendants, all issued prior to the effective date of the Revenue Act of 1918.[2] These policies comprised the sole assets of the trust until his death. (R. 55–56.)

Before the transfer, the decedent had borrowed $398,898.51 upon the security of the policies, that amount representing the maximum loan value on the date of the transfer. (R. 56.)

The trustees invariably applied to the payment of premiums and of interest on each policy loan all dividends on the policies, together with the maximum additional loan values created as a result of the payment of each new premium. The total amount of the policy loans procured by the trustees subsequent to the transfer of the policies to them and applied by them in partial payment of premiums and interest on policy loans was $114,539.69. The decedent paid the balance of

[2] As stated by the Tax Court (R. 58), the record does not disclose whether the proceeds of the policies were payable upon his death to named beneficiaries or to his estate.

premiums and interest in the total sum of $183,026.45. (R. 56.)

The only value of the policies comprising the corpus of the trust was the difference between the loan value and the terminal reserve value. At the decedent's death, the trustees received $421,815.66 as the proceeds thereof. (R. 58.)

It was stipulated and the Tax Court found that the transfer of the policies "was motivated solely by the decedent's desire to avoid estate taxes thereon and was not otherwise made in contemplation of death within the meaning of the Revenue Acts of 1926 and 1932, as amended, or of the Regulations thereunder." (R. 58, 59.)

Accordingly, the Tax Court stated that it was of the opinion that the decedent's sole motive in making the transfer was one connected with death and not with life and that the transfer was therefore one made in contemplation of death. (R. 59–60.) The Tax Court thereupon concluded that the proceeds of the policies realized by the trustees were properly included for estate tax purposes in the decedent's gross estate (R. 62), as the Commissioner had determined (R. 23). The Circuit Court of Appeals affirmed. (R. 80.)

ARGUMENT

The decision below is correct. It presents no conflict and there is no necessity for further review.

1. This Court in *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, 635, clearly stated that the purpose to avoid the estate tax as the inducing motive for a transfer *inter vivos* brings it within the ambit of the statute, because such motive is "of the sort which leads to a testamentary disposition" within the meaning of the estate tax statute as construed by the Court in *United States* v. *Wells,* 283 U. S. 102, 117. This is so, as the Court explains in the *Trust Co. of Georgia* case in accepting the government's contention (p. 635), because the purpose to avoid the tax would impel the decedent to make an *inter vivos* transfer rather than a will, and since the purpose of the contemplation of death provision of the statute was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (p. 635)—

> the statute is satisfied, * * * where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.

Contrary to petitioners' contention, the decision below is not in conflict with *Allen* v. *Trust Co. of Georgia.* It is true that this Court, in affirming the decision of the lower court in the *Trust Co. of Georgia* case, held that the transfer or the relinquishment of the power to amend which was there involved was not made in con-

templation of the decedent's death. This holding, however, was rested upon the concurrent findings of the two lower courts (p. 636) that the transfers and the relinquishment of the powers to amend were, under the facts of the case, parts of one integrated transaction, the dominant motive for which was to assure income to each of the decedent's two impecunious children, with the result that the purpose to avoid the tax was merely incidental.

Here there is no similar finding. On the contrary, this case is presented upon a stipulation (R. 30) and a finding based thereon (R. 58) that the *sole* purpose of the decedent in making the transfer was to avoid estate taxes thereon. The concurrent findings of the two lower courts herein are to the effect that the transfer was made in contemplation of death. Furthermore, the life insurance policies transferred in 1932 were acquired by the decedent more than 13 years prior thereto, and during this period the decedent appears to have been the unrestricted owner of the policies. Thus, this case presents the very situation which this Court said did not exist in the *Trust Co. of Georgia* case, namely, that of "a settlor, having made one plan for the disposition of his property, later makes a different one to avoid estate taxes." P. 636.

2. The petitioners further assert (Pet. 6) that the decision of the Circuit Court of Appeals is in

conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Denniston* v. *Commissioner,* 106 F. 2d 925. The asserted conflict is not argued in the petitioners' brief in support of the petition. However, we submit that there is no existing conflict. In the *Denniston* case the Circuit Court of Appeals for the Third Circuit concluded that a desire to save taxes was not conclusive of a mental state such as is contemplated by the statutory phrase "contemplation of death" where a coexistent motive to complete a long established policy of dividing property equally among children was also present. However, where the controlling motive for an *inter vivos* transfer was the transferor's desire to escape the payment of estate taxes, the Third Circuit has agreed that the transfer must be considered to have been made in contemplation of death. In *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll,* 50 F. Supp. 949 (W. D. Pa.), the District Court so held and the Circuit Court of Appeals for the Third Circuit affirmed *per curiam,* 137 F. 2d 653, "for the reasons sufficiently and satisfactorily given in the opinion" of the District Court.[3]

3. The petitioners further contend (Br. 12–14) that Congress did not intend Section 302 (c) to

[3] In the case at bar no co-existent life motive was suggested.

apply to insurance payable to a designated beneficiary. This contention is advanced notwithstanding the fact that the record does not disclose whether the proceeds of the policies were payable upon decedent's death to named beneficiaries or to his estate. (R. 58.) Assuming, however, as did the Circuit Court of Appeals (R. 77), that the policies were all payable to the decedent's executors, it is now well settled that life insurance may become the subject of a transfer in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, *supra*. *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744. The legislative history upon which the taxpayer relies (Br. 12–13) deals with the taking out of insurance, not with the problem presented here, the transfer of outstanding life insurance policies—a transfer which occurred at a time when such transfers were specifically covered by the taxing section. Since the tax is not levied in respect of the inclusion in the decedent's gross estate of the proceeds of life insurance as such, but in respect of the transfer in contemplation of death of property rights in the policies, there is no basis for the contention.

CONCLUSION

The decision below is in accord with the principles announced by this Court in *Allen* v. *Trust*

Co. of Georgia. There is no conflict. The petition should be denied.

Respectfully submitted.

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AUGUST 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946